A

ONG SEE TEONG & ANOR

v.

TENAGA NASIONAL BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH WAN IBRAHIM J
[JUDICIAL REVIEW APPLICATION NO: R2-25-177-2007]
7 DECEMBER 2007

C ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Application for - Preliminary objection - Grounds advocated by plaintiff lacking necessary precision - Whether should be dismissed for lack of substantive grounds*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for judicial review of respondent's decision to enter lands occupied/belonging to* D *applicants to carry out works upgrading distribution supply lines - Whether impugned decision illegal for both procedure and substantive ultra vires - Whether s. 13 of the Electrical Supply Act 1990 applicable - Whether respondent has power to proceed with work over applicants' lands* E *- Whether there was requirement to endorse wayleave - Whether existing posts as envisaged under s. 13 ESA 1990 - Whether issuance of s.13 notice within procedure - Whether applicants deprived of right to object and be heard by State Authority under s. 11 ESA 1990 - Public interest - Whether outweighed applicant's interest - Consideration of - Whether* F *remedy should be in form of monetary compensation*

PUBLIC UTILITIES: *Electricity - Entering lands occupied/belonging to applicants in carrying out works - Application for judicial review against decision - Whether impugned decision illegal for both procedure and substantive ultra vires - Whether s. 13 of the Electrical Supply Act 1990* G *applicable - Whether respondent has power to proceed with work over applicants' lands - Whether there was requirement to endorse wayleave - Whether existing posts as envisaged under s. 13 ESA 1990 - Whether issuance of s. 13 notice within procedure - Whether applicants deprived of right to object and be heard by State Authority under s. 11 ESA 1990* H *- Public interest - Whether outweighed applicant's interest - Consideration of - Whether remedy should be in form of monetary compensation*

I

This was an application for judicial review of the respondent's decision pursuant to a notice issued under s. 13 of the Electricity Supply Act 1990 ('ESA 1990'), whereby the respondent sought to, *inter alia*, enter into the lands belonging to or occupied by the applicants in Kampung Sungai Terentang to carry out the following activities (i) to carry out works to upgrade the distribution supply lines and to lay and place supply lines within the areas where posts have been erected and to construct and to reserve a 5 foot pathway for the inspection of the said lines; (ii) to use the existing access road and lanes for the construction and completion of all of the above works; (iii) to carry out maintenance, repairs and upgrading of the electrical installation from time to time. The substantive orders sought by the applicants in this judicial review proceeding were (a) an order of *certiorari* to quash the decision of the respondent in issuing the notice under s. 13 ESA 1990; (b) a stay order against the respondent to carry out the works pending the disposal of this proceeding; (c) a declaration that notices issued under s. 13 ESA 1990 was null and void and (d) an injunction restraining TNB from carrying out the works proposed in notices issued under s. 13 ESA 1990. The applicants sought to rely on the following grounds as enumerated in their amended statement under O. 53 r. 3(2) of the Rules of the High Court 1980 ('the statement'): (1) the impugned decision was illegal for both procedure *ultra vires* and substantive *ultra vires* since s. 13 of the ESA 1990 was not applicable for work involved in the Central Area Reinforcement Project ('the CAR Project') and as such the respondent did not have the power to proceed with the work over the applicants' lands; (2) the respondent had failed to take into consideration relevant matters and/or had taken into consideration irrelevant matters in making the impugned decision; (3) the respondent in deciding to proceed work on the applicants' lands had acted in a manner a reasonable body charged with the same functions and responsibility would not have done and (4) the respondent had failed to take into consideration the proportionality and effect of its decision to the extent that monetary means could not compensate the applicants adequately in them not proceeding with the proposed alternative route. The applicants have received notices issued by the respondent stipulating the intention of the respondent to enter the applicants' lands to carry out the CAR project as identified in their proposed

route under s. 13 ESA 1990. The applicants were dissatisfied and aggrieved by the respondent's decision thus initiated this application for judicial review.

Held (dismissing the application):

(1) Two preliminary points were raised by the respondent: (i) that the applicants had raised a number of serious disputes as regard the facts in this application for judicial review which should not be allowed and (ii) in relation to the alleged new grounds of challenge which were not pleaded by the applicants in their statement and affidavit. Against the backdrop of the case *Tuan Haji Sarip Hamid,* which dealt with the applicant's failure to furnish substantial particulars of the facts and matters in their statement and affidavit supporting their application for leave, it would be wrong for this court to inquire into the contested facts raised by the applicants in this judicial review proceeding. Further, the general rule is that the applicants are bound by the four corners of their pleadings. In this instant case, it was found that the grounds advocated by the applicants were too general in nature lacking the necessary precision. In view of the glaring defects and mistakes attributed by the applicants, this application should be dismissed for lack of substantive grounds stipulated in the statement. (paras 15, 17, 18, 19, 20, 21, 23, 25 & 27)

(2) However, the issues and new grounds raised by the applicants in their subsequent submission, which were objected by the respondent, were also discussed. Regarding the first ground contended by the applicants in support of this application on the illegality occasioned by procedure and substantive *ultra vires* of the issuance of notice under s.13 of the Act, it was patently clear that at all material times, Kampung Sungai Terentang was under the status of State Land from the 1950s until the alienation of the lands to the applicants in the 1980s. The applicants did not dispute the fact that the existing posts have been erected as early as around 1974-75. This was consistent with the respondent's averment that LLN ('the respondent's predecessor in title) was allowed by the State Government to enter into the said State Land for the purpose of installing and carrying its transmission lines. (para 33)

(3) It was self evident from the unequivocal wording of s. 52 of the Electricity Supply Act 1949 (the predecessor of the Electricity Supply Act 1990) that there was no requirement for the land authority to endorse any wayleave granted pursuant to this section. Further, the applicants had taken no steps since 1985 to object or to resort to s. 55(5) of the 1949 Act to have the existing posts removed from the current locations. As such the applicants could not now dispute the very existence of the posts upon their lands. The contentions of the applicants must fail and it was concluded that the existing posts are 'posts or other equipment that have been erected' as envisaged under s. 13 ESA 1990. (paras 36, 38 & 40)

(4) The wording of s. 13 of the ESA 1990 is clear, the exercise of the respondent was only conditioned for the purpose of maintaining, repairing or upgrading any license installation or any part thereof. In the absence of any conclusive evidence tendered by the applicants showing otherwise, it should be accepted that the current posts were installed validly. The issuance of s. 13 notice was perfectly within the procedure envisaged for its current purpose of upgrading the transmission line from 33kV to 275 kV. (para 42)

(5) As regards the applicant's argument that the respondent had not issued a s. 11 notice and therefore could not proceed under s. 13, the only nexus between these two sections was this: in a situation where the posts or transmission lines had been laid or erected, in cases where compensation had not previously been assessed under s. 11, a full compensation should be paid in accordance with s. 16 for damages occasioned in carrying out further maintenance, repair and upgrading. Therefore the applicants could not, by their own stretch of the imagination, extend the plain wording of the provisions in line with their contention. It would be wrong for the applicants to claim that they had effectively been deprived of the right to object to the project and be heard by the State Authority, a right as provided under s. 11, which was absent in s. 13. It was a glaring fact that, contrary to their deposition, the applicants had been accorded with numerous

meetings with the State's EXCO, the Member of Parliament for that constituency, the Minister and the respondent, which spanned across two years from 2005 to 2007. (paras 45 & 47)

(6) There was no misconduct or *ultra vires* as alleged by the applicants on the impugned decision of the respondent in exercising their statutory power conferred under s. 13 ESA 1990. Therefore, this court was unable to accede on the argument that the impugned decision of the respondent was 'wholly irrational, unreasonable and against the principle of proportionality' as contended by the applicants. (para 52)

(7) The whole substratum of the case at hand lies on public interest. In assessing whether public interest outweighed the applicants' private rights, this court was mindful of the main objective of the CAR Project, which was to prevent the disruption of electricity supply, which had happened nationwide on 13 January 2005. Public interest in the prevention of a disruption of electricity supply certainly would outweigh the private interest of the applicants. Therefore, the scale of justice weighed in favour of the public interest in the construction of the electricity transmission and distribution system in the instance case. However, the applicants were not without any remedy as claimed. The remedy was in the form of monetary compensation. The applicants have not made out a case for judicial review on any of the grounds on which judicial review was sought. (paras 55 & 56)

Case(s) referred to:

Bharat Plywood & Timber Products Private Ltd v. Kerala State Electricity Board Trivandrum & Ors AIR [1972] Kerala 47 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Goh Joon v. Kerajaan Negeri Johor [1999] 5 CLJ 335 HC ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Government of Malaysia v. Selangor Pilot Association [1977] 1 MLJ 133 ***(refd)***

Kerala State Electricity Board v. PM Maitheyan AIR [1973] Kerala 95 ***(refd)***

O'Riley v. Mackman [1983] 2 AC 237 ***(refd)***

Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA ***(foll)***
Tenaga Nasional Berhad v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***
Tuan Hj Sarip Hamid v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
V Paul Raj Chelladurai v. Jabatan Telekom (M) & Anor [2000] 4 CLJ 882 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Electricity Supply Act 1949, ss. 52, 55(5), 56
Electricity Supply Act 1990, ss. 11, 13, 16
Federal Constitution, art. 13
Rules of the High Court 1980, O. 53 r. 3(1), (2)

For the applicants - William Leong Jee Keen; M/s HC Tan & Zahani
For the respondent - Dato' Cyrus Dass (Steven Thiru & Shamsul Bahrin with him); M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Afrah Wan Ibrahim J:

The Application For Judicial Review

[1] This is an application for judicial review of the respondent's decision dated 21 June 2007, pursuant to a notice issued under s. 13 of the Electricity Supply Act ("ESA 1990"), whereby the respondent sought to, *inter alia*, enter into the lands belonging to or occupied by the applicants in Kampung Sungai Terentang to carry out the following activities:

(i) to carry out works to upgrade the distribution supply lines from 33kV to 275 kV and to lay and place supply lines within the areas where posts have been erected and to construct and to reserve a 5 foot pathway for the inspection of the said lines;

(ii) to use the existing access road and lanes for the construction and completion of all of the above works;

(iii) to carry out maintenance, repairs and upgrading of the electrical installation from time to time;

Relief Sought

[2] The substantive orders sought by the applicants in this judicial review proceeding are as listed down below:

(i) an order of *certiorari* to quash the decision of the respondent in issuing the notice under s. 13 ESA 1990.

(ii) stay order against the respondent to carry out the works pending the disposal of this proceeding.

(iii) a declaration that notices issued under s. 13 ESA 1990 is null and void; and

(iv) an injunction restraining TNB from carrying out the works proposed in notices issued under s. 13 ESA 1990.

The Grounds Supporting This Applications

[3] The applicants seek to rely on the following grounds as enumerated in their amended statement under O. 53 r. 3(2) of the Rules of High Court 1980 ("the statement"):

(i) the impugned decision is illegal for both procedure *ultra vires* and substantive *ultra vires* since s. 13 of the Act is not applicable for work involved for the CAR project and as such the respondent does not have the power to proceed with the work over the applicants' lands.

(ii) the respondent had failed to take into consideration relevant matters and/or had taken into consideration irrelevant matters in making the impugned decision.

(iii) the respondent in deciding to proceed work on the applicants' lands has acted in a manner a reasonable body charged with the same functions and responsibility would not have done.

(iv) the respondent failed to take into consideration the proportionality and effect of its decision to the extent that monetary means cannot compensate the applicants adequately in them not proceeding with the proposed Alternative Route.

Background Of The Case

[4] According to the applicants, Kampung Sungai Terentang is located between the Rawang Village and Kanching Village, 16 miles along the right hand side of the old road from Kuala Lumpur to Ipoh. Historically, it became a Chinese New Village in the late 1940s when about 1,500 Chinese in the surrounding areas were moved by the British Government pursuant to the Briggs' Plan to be relocated in the Kampung Sungai Terentang New Village.

[5] Based on the facts deposed by the applicants, there are now about 600 residential houses in Kampung Sungai Terentang with a population of about 5,000 residents. The applicants asserted that until the 1980s, the residents occupied the lands as licensees. They were given temporary occupation licenses. In or around the late 1980s, it was said that most of the residents were successful in their applications for the lands to be alienated to them by the State Government. They have, at all material time, paid the premium, fees for the registration of title, survey and quit rent and have been issued with the titles to the land.

[6] In or about 2005, the respondent began upgrading its transmission line in the central area of the Peninsular Malaysia, as part of its long term plan to enhance the electricity supply system under the Central Area Reinforcement Project ("the CAR Project"). It is meant to prevent the recurrence of the massive electricity supply disruption of 13 January 2005, which had caused huge damages and losses to the country.

[7] The CAR Project involves, *inter alia*, replacing its existing 33kV transmission line to 275 kV, starting from Bukit Tarek and ends at Chubadak, which covers a total area of 60km. Upgrading works across the total 60km area are divided into 5 sectors, where the disputed stretch in the Kampung Sungai Terentang forms 1.5km of the total 15km of the third sector connected from Rawang to Bukit Lagong.

[8] As the matter stands, it was not disputed that the respondent had completed the upgrading works for 58.5km out of the total 60km, leaving out the remaining 1.5km in the Kampung Sungai Terentang area, occupied by 51 families, which includes the 25 applicants in this instance case. From evidence deposed before this court, the applicants had voiced their objection as early

as in 2005 to the respondent when they first came to realize about the CAR project and the proposed route identified, which passes through the New Village and the applicants' lands.

[9] From 2005 until 2007, numerous meetings were held between the applicants and the respondent, the State's Assemblyman and later with the Minister of Energy, Water and Communications, objecting the proposed route, which passes through the applicants' lands. Despite the initiatives, the applicants have received notices issued by the respondent dated 21 June 2007, stipulating the intention of the respondent to enter the applicants' lands to carry out the CAR project as identified in their proposed route under s. 13 ESA 1990. The applicants were dissatisfied and feeling aggrieved by the respondent's decision initiated this application for judicial review.

Principles Governing Judicial Review

[10] It is beneficial to remind myself at this juncture of the guiding principles of judicial review. It is axiomatic that the High Court exercises a supervisory jurisdiction in judicial review proceedings over the decisions of public authorities and administrative bodies by virtue of s. 25(2) of the Courts of Judicature Act 1964 read with para 1 of the Schedule to the CJA.

[11] As a matter of law, the respondent, a public company, is treated as a "public authority" for judicial review purposes because it exercises certain statutory powers under ESA 1990 (and previously under the 1949 Act), such as when it decided to issue the s. 13 notices here. The similar authority can be found in the Court of Appeal case of *Tenaga Nasional Berhad v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 CA which involved the issuance of notices under s. 11 ESA 1990.

[12] I took cognizance that the role of the High Court in judicial review proceedings is to detect whether the decision making process of the public authorities or administrative body is infected by "errors of law". The High Court is empowered to strike down a decision of a public authority if it commits "errors of law". As to what amounts to "errors of law", judicial guidance is to be found in the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1995] 2 CLJ 748 where Gopal Sri Ram JCA expressed the following view:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or to takes into account irrelevant consideration or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or mis-applies or mis-states a principle of the general law.

[13] The classic enunciation of the three main grounds under which "errors of law" are housed (namely, illegality, irrationality and procedural impropriety) was by Lord Diplock in the case of Council of *Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (at pp. 410-411) where his Lordship held thus:

> By illegality ... I mean that the decision maker must understand correctly the law that regulates his decision making power and give effect to it ... by "irrationality" I mean what can now be succinctly referred to as "Wednesbury Unreasonableness" ... It applies to decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applies his mind to the question to be decided could have arrived at it ... I have described the third head as "procedural impropriety" rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[14] The judicial review jurisdiction has been described as "... an "extraordinary" original jurisdiction of the High Court, supervisory in character rather than appellate or revisonary ..." in the case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110. The exercise is also being regarded as a discretionary jurisdiction. In this relation, the High Court in *Goh Joon v. Kerajaan Negeri Johor* [1999] 5 CLJ 335 (at p. 374) put it as follows:

A At this juncture, it is germane to refer to a passage of a book entitled *An Introduction to Administrative Law* (2nd Ed), by Peter Cane particularly at p. 69 thereof. There the learned author said:

> The prerogative orders, declarations, and injunctions are all discretionary remedies. This mean that even if the applicant
B has standing, has made the application in good time, and can establish that the Respondent has acted illegally, he or she may be denied relief if the court thinks, for some reason, that the relief should not be granted (Sir Thomas Bingham [1991] PL 64). The fact that a decision is void
C or that some action or inaction is illegal does not impose on the court any obligation to award a remedy to the applicant. This discretion can also be used to justify refusal of leave to apply for judicial review under RSC O. 53; and so it is sometimes said that the whole judicial review jurisdiction is discretionary, not just the remedies.

D

The Decision

[15] Before turning our attention to the applicants' submissions, I think that it is only prudent for this court to deal with the
E preliminary point raised by Dato' Cyrus Dass at this juncture. It was argued that the applicants had raised a number of serious disputes as regard the facts in this application for judicial review, which, to the learned counsel for the respondent, should not be allowed. The facts disputed, among others, are: the proper
F location or a boundary of the existing posts; the existence of the wayleave granted by the State Authority, and the viability of the alternative route proposed by the applicants.

[16] Dato' Cyrus Dass cited the Supreme Court's case of *Tuan Haji Sarip Hamid v. Patco Malaysia Berhad* [1995] 3 CLJ 627 in
G support of his stance. With due respect, upon careful perusal of the authority cited, I found that the whole passage of the said judgment is enlightening. The full text (at p. 631) is reproduced as follows where it was adjudged that:

H > The salutary advice of Lord Justice Dunn in *Regina v. The Secretary of State for Trade and Ors. Exparte Anderson Strathclyde plc* [1983] All ER 233 should be kept in the forefront of the mind of any lawyer who drafts the Statement for purposes of O. 53 r. 1(2) and the Affidavit in support thereof. What the learned Lord
I Justice said was this (at page 239(f)):

> **Proceedings for judicial review are not designed for detailed enquiry into contested facts.** It is for the applicants to take all proper steps to put the facts on which they rely in support of the relief claimed before the Court at the first opportunity ... (emphasis added)

[17] The fact of that case involved an application for the leave to apply for an order of *certiorari* to quash an award of the Industrial Court. Edgar Joseph Jr. FCJ quoted the above passage in light of the failure of the applicant to furnish substantial particulars of the facts and matters in their statement and affidavit supporting their application for the leave. In the instant case, even though this court had granted leave on an earlier occasion to the applicants, the principle laid down in the case of *Tuan Haji Sarip Hamid* is still binding on this court.

[18] Against this backdrop, it would be gravely wrong for this court to inquire into the contested facts raised by the applicants in this judicial review proceeding. This is patently clear as Edgar Joseph Jr. FCJ affirmed subsequently in the same case with reference to Lord Diplock dictum in *O'Riley v. Mackman* [1983] 2 AC 237, that

> The facts ... can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's finding of fact, as distinguished from legal consequences of the fact that they have found, are not open to review by the Court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14 at p. 36).

[19] To my mind therefore, it is neither necessary nor desirable for this court to inquire into the disputed facts raised by the applicants in support of their current application.

[20] I consider the first issue had been sufficiently elucidated as aforesaid. It is only necessary for me now to state in passing another preliminary point raised by Dato' Cyrus Dass, which is in relation to the alleged new grounds of challenge which were not pleaded by the applicants in their statement and affidavit. In this regard, Dato' Cyrus Dass relied on the case of *V. Paul Raj Chelladurai v. Jabatan Telekom (M) & Anor* [2000] 4 CLJ 882, where Siti Norma Yaacob JCA said in her judgement that:

A Order 53 r. 3(1) of the RHC emphasizes the principle that *a party is bound by his own pleadings and since that the order and rule is mandatory in nature, the omission to plead in the Statement the objections raised before us is sufficient reason for us to hold that this appeal lack merits and on that conclusion we dismiss it with costs* ... (emphasis added)

B

[21] Dato' Cyrus Dass pointed out that there were three new grounds which were not pleaded by the applicants in their statement supporting the leave application: The first ground being that whether there exist a wayleave agreement that entitles the C respondent to enter the said lands; the second ground being that whether the respondent possessed the necessary power of acquisition under s. 13 of the Act, and the constitutionality of the s. 13 notice issued thereof; and the third ground being that whether the applicants were denied the right to be heard.

D

[22] With all respect, having considered all the relevant materials, I agree with the learned counsel for the respondent on this argument. Even though it is observed that the rationale in the case of *V. Paul Raj Chelladurai v. Jabatan Telekom (M) & Anor* E must be read in the narrow scope of O. 53 r. 3(1) which has now been amended pursuant to the Rules of the High Court (Amendment) 2000 (PU(A) 342/2000) para 18, I reminded myself that it is undesirable for the applicant to be allowed to "roam at large, well outside its proper confines."

F

[23] To my mind, as in other proceedings, counsel must always remember the general rule that the applicants are bound by the four corners of their pleadings. As a matter of general principle, the applicants could only rely on the grounds and relief that were G set out in the statement. It is also fatal for the applicants to raise new grounds of challenge in the affidavits in support or tendered *via* oral or written submission at the later hearing stage.

[24] It is also a cardinal requirement that the applicants must set out their grounds clearly in the statement supported by sufficiently H detailed and comprehensive particulars of the facts and matters on which the applicants intend to rely in support of their application. The requirement for the precision is to ensure that judicial review is conducted within the ambit or scope of the specific impugned decision.

I

[25] In the instant case however, the court found that the grounds advocated by the applicants were too general in nature lacking the necessary precision. It is insufficient for the applicants to state merely that the exercise by the respondent is illegal, unreasonable or other commonly acceptable grounds without linking to the specific or particular facts alleged. The court is not duty-bound to fill in the gaps left open by the applicants.

[26] I reminded myself of the proper principle governing judicial review application as elucidated above. This court will only exercise its discretion to release the prerogative orders from the judicial confinement conditioned upon the applicants to satisfy this court that the impugned decision of the respondent was inflicted with some form of error of law.

[27] On the facts of the case at hand however, in view of the glaring defects and mistakes attributed by the applicants as discussed in the foregoing, this court is left with no grounds to review, which may lend support to the applicants' current application. As such, this court is ready to dismiss this application for lack of substantive grounds stipulated in the statement. I am mindful however that, in the event I was wrong to arrive at this conclusion, the issues and new grounds raised by the applicants in their subsequent submission, which were objected by the respondent, are discussed as follows.

First Ground; Illegal For Procedure And Substantive *Ultra Vires*

[28] The first ground contended by the applicants in support of this application is on the illegality occasioned by procedure and substantive *ultra vires* of the issuance of notice under s. 13 of the Act. Based on my understanding of the case at hand, I find that it is crucial to understand the precise wording of s. 13 in order to scrutinize whether the respondent had validly exercised the statutory power conferred on them under that provision.

[29] For the above reason, s. 13 of the Act is reproduced as below:

13. Maintenance, repair and upgrading of installation

Whenever it is necessary so to do for the purpose of *maintaining, repairing or upgrading* any *licensed installation* or any part thereof, the licensee, or any person authorized by him in that behalf, may *at all reasonable times enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected*, and may carry out all necessary repairs, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary for the said purpose, *causing as little damage as possible and paving full compensation* in accordance with section 16 to all person interested for any damage that may be caused thereby *for which compensation has not already been assessed under section 11.* (emphasis added)

[30] From the plain wording of s. 13, it is abundantly clear that the true spirit of s. l3 premised on "... any licensed installation or any part thereof ..." and "enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected". In the instant case, it is the contention of the applicants that the respondent had wrongly invoked s. 13, as in a nutshell, the very existence of the posts were contended. While I reminded myself that it is not the onus of this court to ascertain the disputed facts in judicial review proceedings, for the completeness of discussion, this court will undertake the detailed examination of the applicants' argument in the following breakdown of sub-headings:

Initial Posts Outside The Boundaries Of The Village And No Wayleave Agreement

[31] Mr. William Leong, learned counsel for the applicants argued that the existing supply lines or posts erected by the respondent are trespassing on the applicants' lands. It is his contention that under s. l3, the respondent can only enter upon land where the supply line or posts are erected lawfully and not where such supply lines or posts are trespassing on the lands.

[32] Upon careful perusal of exh. "P10" to encl. 3, exh. "P15" to encl. 12, and exh. "P24" to the applicants 8th affidavit affirmed on 5 October 2007 tendered by the applicants, and exh. "TNB2", "TNB3" "TNB4" and the deposition in para 11-15 of the respondent affidavit in reply affirmed on 7 August 2007 (encl. 6) tendered by the respondent, the court is more inclined to find in favour of the respondent.

[33] To my mind, based on the facts deposed by both parties, while there remain doubts as to the proper boundary and location of the existing pots, it is however patently clear that at all material times Kampung Sungai Terentang was under the status of State Land from 1950s until the alienation of the lands to the applicants in the 1980s. The applicants did not dispute the fact that the existing posts have been erected as early as around 1974-75 as deposed in the respondent 4th affidavit affirmed 5 September 2007 (encl. 31). On this premise, it is my view that this is consistent with the respondent averment that LLN (the respondent's predecessor in title) was allowed by the State Government to enter into the said State Land for the purpose of installing and carrying its transmission lines.

[34] The applicants further submitted that the issue document of titles do not show that the proposed route is on LLN reserve and there was no endorsement of any wayleave agreement between the parties contained therein. The applicants averred that s. 56 of the Electricity Act 1949 requires any wayleave agreement to be endorsed on the issue document of title. In the absence of such endorsement, it was said, there is no wayleave agreement. Consequently, the respondent's existing posts do not have legal authority to be passing through the applicants' lands and thus s. 13 of the Act cannot apply.

[35] In this regard, s. 52 of the Electricity Supply Act 1949 (the predecessor of the Electricity Supply Act 1990) is relevant. Section 52 of the 1949 Act provides that:

> **52 Power to enter on State or Crown land for purpose of Board installation**
>
> For the purpose of constructing a supply line for any Board installation, the Chairman or any person authorized by him in that behalf may, at all reasonable times, enter upon any State or Crown land and may, subject to the approval of the Land Authority, erect in or upon such State or Crown land such posts and other apparatus as may be necessary or proper for the purposes of such installation, and may carry out all necessary works in connection therewith, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to such purposes:

A Provided that:

(a) When any such work interferes with improvements, buildings, growing trees or crops, the Board shall pay compensation in accordance with the provisions of section 58 of this Ordinance for disturbance or damage; and

B

(b) Where the land is occupied under a license for temporary occupation, such compensation shall be paid to the applicant recorded in the Roll of Approved Applications, by whatever name such Roll is called in the State wherein the land is situated.

C

[36] It is self-evident from the unequivocal wording of s. 52 of the 1949 Act that there is no requirement for the Land Authority to endorse any wayleave granted pursuant to this section. In fact, this court is ready to find that there is no mention of any wayleave D in this provision at all. All that is required from the respondent is to secure the approval from the Land Authority for the installation of posts upon the State land.

[37] I observed that the respondent does not furnish any E evidence in support of the approval from the Land Authority. However, in my mind, this is not fatal for the respondent case as it cannot be disputed that the existing posts had been erected at least since 1974-75 based on the affidavit filed by the parties.

F **[38]** Against this backdrop, with respect, I therefore do not find support in the applicants' contention that the s. 13 notice is bad because there is no Wayleave Agreement endorsed on the applicants' issue document of titles when the lands were alienated to them in 1980s.

G **[39]** Furthermore, it is also my observation that the applicants took no steps since 1985 to object or to resort to s. 55(5) of the 1949 Act to have the existing posts removed from the current locations. The common law principle of acquiescence, as can be seen in the case of *Kerala State Electricity Board v. P.M. Maitheyan* H AIR [1973] Kerala 95 where it was adjudged that:

> In this case, *the owner of the property had raised no resistance or objection when the lines were laid over this property.* It was long after the lines were laid that the respondent purchased the property from the original owner. *There is no justification in his now saying* I *that the lines should not have been laid over the property as the law had permitted him the right to object to the laying of the line.* (emphasis added)

[40] As such, the applicants cannot now dispute the very existence of the posts upon their lands. In view of the foregoing, I have no doubt these contentions of the applicants must fail and this court readily concludes that the existing posts are "posts or other equipment that have been erected" as envisaged under s. 13 ESA 1990.

[41] Having arrived at the conclusion that the existing posts are "posts or other equipment that have been erected" envisaged under s. 13 ESA 1990, as discussed above, with due respect, this court is unable to accede to the applicants' subsequent argument that s. 13 only permits the respondent to "fell or lop trees, remove vegetation and do all other things necessary for purpose of necessary repair only."

[42] The wording of s. 13 is clear, the exercise of the respondent is only conditioned for the purpose of maintaining, repairing or upgrading any license installation or any part thereof. In the absence of any conclusive evidence tendered by the applicants showing otherwise, this court is left with no room but to accept that the current posts were installed validly. In this premise, the natural conclusion would be that the issuance of s. 13 notice was perfectly within the procedure envisaged for its current purpose of upgrading the transmission line from 33kV to 275 kV.

Section 11 Has Not Been Complied With

[43] Learned counsel for the applicants sought to contend on the ground that the wording of s. 13 presumed that s. 11 had been complied with in the first place. Accordingly, the applicants argued that the respondent had not issued a s. 11 notice and therefore cannot proceed under s. 13. The rationale behind this argument, according to Mr. William Leong in his oral submission was that the applicants were deprived of the opportunity to object to the proposed route, and further deprived of the proper authority (the State Authority as contended in this case) to determine whether their lands should be acquired.

[44] Section 11 of the Act provides that:

11. Power to enter on land for purposes of construction

(1) Subject to as hereinafter provided, whenever it is necessary so to do for the purpose of installing any system of distribution of electricity under this Act, a licensee may lay, place or carry on, under or over any land, other than State land, such post and other equipment as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 16 to all persons interested for any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.

(2) Before entering on any land for the purpose specified in subsection (1), the licensee shall give a notice stating as fully and accurately as possible the nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the First Schedule and the District Land Administrator shall specify a date upon which the State Authority shall inquire into any objection that may have been made as hereinafter provided.

(3) The aforesaid notice shall be given:

(a) in the case of alienated land, to the owner or the occupier;

(b) in the case of reserved land, to the officer or any other person in charge of the reserved land or, in the absence of any such officer or person, to the District Land Administrator,

and may be sent by registered post or be left at the usual or last known place of abode of the person to whom it is to be given or served by the licensee, either in the manner hereinbefore provided or in the manner provided for the service of notices by any written law relating to land in force in the State where the land is situated.

(4) Any of the persons mentioned in subsection (3) may, within fourteen days of the receipt of the notice therein referred to, lodge an objection to the intended acts of the licensee. The objection may be made to the District Land Administrator, either verbally or in writing, and the District Land Administrator shall give notice of the objection to the State Authority and to the licensee.

(5) If no objection is lodged within the time limited for that purpose by subsection (4), the licensee may forthwith enter on the land and do all or any of the acts specified in the notice given under subsection (2).

(6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the District Land Administrator shall hold an enquiry, giving all parties an opportunity to be heard.

(7) Upon the conclusion of the enquiry the District Land Administrator may either unconditionally or subject to such terms, conditions and stipulation as he thinks fit, make an order authorizing or prohibiting any of the acts mentioned in the notice given under subsection (2). The order shall be substantially in the form set out in the Second Schedule:

Provided that any party who is dissatisfied with the District Land Administrator's order may within twenty-one days after the order appeal against such an order to the State Authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit.

(8) The State Authority may, if it thinks fit, *in lieu* of making an order under subsection (7), direct the acquisition of any land or part of any land included in a notice given under subsection (2).

(9) The decision of the State Authority under this section shall be final.

(10) ...

[45] Upon close scrutiny of s. 11 and s. 13 of the Act, the court is unable to fly against the plain and unequivocal wording of the provisions, to suggest otherwise as contended by the applicants. In my observation, the only nexus between s. 11 and s. 13 is this: in a situation where the posts or transmission lines had been laid or erected, in cases where compensation had not previously been assessed under s. 11, full compensation should be paid in accordance with s. 16 for damages occasioned in carrying out further maintenance, repair and upgrading. It is for obvious reason therefore that the applicants could not, by their own stretch of imagination, extend the plain wording of the provisions in line with their contention.

[46] While it is neither necessary nor desirable for this court to illustrate a situation envisaged under the provision, the instant case at hand clearly exemplifies appropriate scenario: when the posts were first erected upon the said lands, the lands were under the status of State land. For historical reasons not deposed and made available to the court, no compensation whatsoever had been assessed or paid out to the applicants. It may be that at that point in time no objection was raised by the aggrieved residents, who occupied the said lands as licensees, or it may even be that there was no human inhabitant then as alleged by the respondent. For all intent and purposes, the reason why no compensation was assessed is not privy for this court to speculate now. As it transpired now that the said lands had later been alienated to the applicants, compensation should be assessed in accordance with s. 16 for any damages that may be caused by the respondent in carrying out further maintenance, repair and upgrading.

[47] At this juncture, it is germane for this court to state at once that, it would, I think, be wrong, for the applicants to claim that they had effectively been deprived of the right to object to the project and be heard by the State Authority, a right as provided under s. 11, which was absent in s. 13. In my view, on the material available, it is a glaring fact that, contrary to their deposition, the applicants had been accorded with numerous meetings with the State's EXCO, the Member of Parliament for that constituency, the Minister and the respondent, which spanned across the two years from 2005 until 2007. That I regard as the sufficient answer to the claim.

No Power Of Compulsory Acquisition Under s. 13

[48] I do not think it necessary or relevant to deal with this further point raised in much detail. As to this I would only dismiss this ground with the observation that the respondent's proposed work on the applicants' land do not contravene art. 13 of the Federal Constitution as contended. The Land Acquisition Act 1968 does not apply in determining whether the respondent could carry out the upgrading work on the disputed lands. It follows in my view therefore it was only necessary to reiterate the principle decided by Gopal Sri Ram JCA in the case of *Tenaga Nasional Berhad v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624, at p. 634 where it was adjudged that:

> But we would add with caution that upon a careful scrutiny of the Act, **we are not in agreement with Mr. Kanesalingam's argument that the Act does not enable the setting aside of land.** Pylon cannot be constructed in mid air. They have to rest on solid ground. **It follows that some land has to be set aside for that purpose** ... (emphasis added)

[49] In any event, this court would not hesitate to reaffirm the settled law that the alleged "deprivation" of the applicants' lands was passed in accordance with law, namely the Electricity Supply Act 1990 which was within the competent authority of the Legislature to pass. As such, s. 13 ESA 1990 possesses the necessary statutory authorization to exercise the statutory power conferred thereon. Lest I shall be accused of not referring to relevant authorities, I shall go through the decision in *Government of Malaysia v. Selangor Pilot Association* [1977] 1 MLJ 133, at pp. 135-136, Viscount Dihorne held as follows:

> Their Lordships have carefully considered the views expressed in these Indian cases to which reference has been made and the judgements of the Federal Court in this case have come to the conclusion that Article 13 of the Constitution of Malaysia cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed. Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the words "deprived" in Article 13(1) if it meant and only meant acquisition or use when those words are used in Article 13(2). Great care is usually taken in the drafting of Constitution.
>
> *Their Lordship agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation, also leads to compulsory acquisition or use.*
>
> If in the present case the Association was in consequence of the amending Act deprived of property, *there was no breach of Article 13(1) for the deprivation was in accordance with a law which it was within the competence of the Legislature to pass.* (emphasis added)

A **Second Ground: The Respondent Failed To Take Into Consideration Relevant Matters And/Or Had Taken Into Consideration Irrelevant Matters In Making The Impugned Decision**

B **[50]** We must now refer to one other subject, which was advanced by counsel on behalf of the applicants that the respondent had failed to exercise due diligence in considering the alternative route before embarking on the proposed route. During the course of hearing before this court, learned counsel for the C applicants had asserted a considerable amount of discussion on this point. It was argued that the respondent had proceeded to commence construction of the proposed route and failed to investigate the feasibility of the alternative route even though the applicants' objections were raised as early as in 2005.

D **[51]** As matter stands, a scrutiny of all material available to this court compels me however to disagree with this contention raised by the applicants on the basis of lacking in substance. In saying so, this court is fortified in this view by what is provided in the E project report exh. "TNB6" in the respondent affidavit in reply affirmed on 7 August 2007 (encl. 6). The report prepared by the Chief Engineer of the respondent clearly showed that the feasibility of the alternative route had been considered in detail and it had been rejected based on well-reasoned rationales. It is suffice to F mention the major technical hindrance associated with the alternative route, as highlighted in the report, which includes dismantling of the existing transmission lines for considerably long periods that may result in power outage, and delay occasioned in event to proceed on with the alternative route.

G **Third and Fourth Grounds: Irrationality, Unreasonableness And Principle Of Proportionality**

[52] This court, having unable to find any misconduct or *ultra vires* as alleged by the applicants on the impugned decision of the H respondent in exercising their statutory power conferred under s. 13 ESA 1990. Therefore, suffice for this court to also make the findings that this court is unable to accede on the argument that the impugned decision of the respondent is "wholly irrational, unreasonable and against the principle of proportionality" as I contended by the applicants.

[53] To my mind, I would agree with Dato' Cyrus Dass that the whole substratum of the case at hand now lies on public interest. In assessing whether public interest outweigh the applicants' private rights, this court is mindful of the main objective of the CAR Project, which is to prevent the disruption of electricity supply, which happened nationwide on 13 January 2005. Having considered submissions from both parties, I perceive that the public interest in the prevention of a disruption of electricity supply certainly would outweigh the private interest of the applicants.

[54] I find support in the Court of Appeal's judgment in *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695 (at p. 700) where it was held as follows:

> That brings us to the question of remedy. The evidence on record shows that the offending pylon forms part of the national grid for the conveyance of electricity. It is therefore clear that if a mandatory injunction is maintained *there will be disruption of electricity supply in Peninsular Malaysia. It is not in the public interest that such a disruption should occur.*
>
> In *Smith v. Inner London Education Authority* [1978] 1 All ER 411, Browne LJ held that public interest was always a relevant consideration in granting specific relief. This is how he put it (at p. 422 g-h of the report):
>
> > ... I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public, *one must look at the balance of convenience more widely, and take into account the interest of the public in general to whom these duties are owed.*
>
> No doubt that was said in the context of an interlocutory injunction. But we do not regard the principle to be any different in the case of a final injunction, whether prohibitory or mandatory in nature.
>
> The learned judge in this case failed to take into account public interest. If the learned judge had done so he would have held that the public interest outweigh the respondent's interest.

[55] Therefore, to my mind the scale of justice weighs in favour of the public interest in the construction of the electricity transmission and distribution system in the instance case. At this juncture, I would pause and make my observation that the

A applicants are not without any remedy as claimed. The remedy is in the form of monetary compensation. The illuminating decision in the case of *Bharat Plywood & Timber Products Private Ltd v. Kerala State Electricity Board Trivandrum & Ors* AIR [1972] Kerala 47, provides the answer to the facts of the instance case, where the
B views were expressed as follows:

> ... obviously laying an electric supply line and the distribution of electricity cannot be said to be otherwise than in the interests of the general public.
>
> C *There can, of course, be difference of opinion as to whether a line should be placed over a particular property or not. This must, in the nature of things, be a matter for the statutory authorities created under the Electricity Act to decide.*
>
> D One may have to suffer some detriment in the user of property to serve the common good, *and he cannot complain when full compensation is paid for the detriment.* (emphasis added)

Conclusion

E **[56]** Having heard submissions from counsels on behalf of both parties, my understanding of the law and appreciation of the facts at hand compels me to conclude that the applicants have not made out a case for judicial review on any of the grounds on which judicial review is sought. As such, it is my considered view
F that this application for judicial review should be dismissed for the grounds aforementioned.

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H

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